

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 10th inst.

and in reply to inform you that the same has been forwarded to the proper authorities.

I am, Sir, very respectfully, Sir, your obedient servant,

J. H. [Signature]

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JAN 3 1923

WM. R. STANSBURY
CLERK

No. ~~777~~ ~~156~~ 20

IN THE
SUPREME COURT
OF THE
UNITED STATES

In the Matter of PETE STUMP, Bankrupt,
SAMUEL D. WHITE, Trustee,
Petitioner,

VS

VETA STUMP,
Respondent,

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, REQUIRING IT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATE, FOR ITS REVISION AND DETERMINATION, THE PETITION FOR REVIEW IN BANKRUPTCY TAKEN BY SAID SAMUEL D. WHITE, TRUSTEE IN BANKRUPTCY OF PETE STUMP, IN THE MATTER OF VETA STUMP VS. SAMUEL D. WHITE, TRUSTEE, LATELY PENDING IN SAID COURT OF APPEALS; TOGETHER WITH BRIEF IN SUPPORT THEREOF, MOTION AND NOTICE THEREOF, AND REQUEST FOR SUBMISSION.

SAMUEL O. TANNAHILL,
ROBERT D. LEEPER,
Empire National Bank Building,
Lewiston, Idaho.
JAMES E. BABB,
Lewiston National Bank Building,
Lewiston, Idaho.

✓
JAMES E. BABB, Attorneys for Petitioner.
Of Counsel for Petitioner.

No.....

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In the Matter of PETE STUMP, Bankrupt,
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SAMUEL O. TANNAHILL,
ROBERT D. LEEPER,
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Lewiston, Idaho.

JAMES E. BABB,
Lewiston National Bank Building,
Lewiston, Idaho.

JAMES E. BABB,
Of Counsel for Petitioner.

Attorneys for Petitioner.

No. _____
IN THE
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Is the Matter of PETE STUMP, Bankrupt,
SAMUEL D. WHITE, Trustee,
Petitioner,

vs

VETA STUMP,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT, BEARING IT TO SET
TRY TO THE SUPREME COURT OF THE UNITED
STATE FOR REVISION AND DETERMINATION
THE PETITION FOR WRIT IN BANKRUPTCY
TAKEN BY SAID SAMUEL D. WHITE, TRUSTEE IN
BANKRUPTCY OF PETE STUMP, IN THE MATTER
OF VETA STUMP vs SAMUEL D. WHITE, TRUSTEE
THE LATTER BEING IN SAID COURT ON AP-
PEAL, TOGETHER WITH BRIEF IN SUPPORT
THEREOF, MOTION AND NOTICE THEREOF, AND
REQUEST FOR SUBMISSION.

SAMUEL O. TANAKAHARA,
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JAMES E. BARR,
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Of Counsel for Petitioner.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

**In the Matter of PETE STUMP, Bankrupt,
SAMUEL D. WHITE, Trustee,**

Petitioner,

vs.

VETA STUMP,

Respondent.

ORDER FOR APPEARANCE

**The Clerk will enter my appearance as Counsel for the
Petitioner.**

JAMES E. BABB,

**Residence and P. O. address,
Lewiston National Bank Build-
ing, Lewiston, Idaho.**

No.

IN THE SUPREME COURT OF THE UNITED STATES

**In the Matter of PETE STUMP, Bankrupt,
SAMUEL D. WHITE, Trustee,**

Petitioner,

vs.

VETA STUMP,

Respondent.

**NOTICE OF APPLICATION FOR WRIT OF
CERTIORARI.**

TO VETA STUMP AND PETE STUMP, the above named respondents, and to HARVE H. PHIPPS, of Spokane, Washington, attorney for said respondents:

You and each of you are hereby notified that the petitioner will on Monday, the 22nd day of January, 1923, upon his verified petition and a certified copy of the entire record in cause numbered 3904, between the above named parties in the Circuit Court of Appeals of the Ninth Circuit, at the opening of the above entitled court on that day, or as soon thereafter as counsel can or may be heard, submit a motion (a copy of which, and of the petition for writ of Certiorari and brief in support thereof, are herewith respectfully delivered and served upon you) to the Supreme Court of the United States, in its Court Room at the Capitol, in the City of Washington, D. C.

**SAMUEL O. TANNAHILL,
ROBERT D. LEEPER,
JAMES E. BABB,**

**Attorneys and of Counsel for
Petitioner.**

**JAMES E. BABB,
Of Counsel for Petitioner.**

No.

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of **PETE STUMP**, Bankrupt,
SAMUEL D. WHITE, Trustee,

Petitioner,

vs.

VETA STUMP,

Respondent.

**MOTION FOR WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Now comes Samuel D. White, as petitioner, and moves this honorable court that it shall by a certiorari or other proper process directed to the judges of the United States Court of Appeals for the Ninth Circuit, require and command said court to certify to this honorable court for its review and its determination a certain cause in said United States Circuit Court of Appeals for the Ninth Circuit, lately pending, numbered therein 3904, and entitled, In the Matter of Pete Stump, Bankrupt, Samuel D. White, Trustee, Petitioner, vs. Veta Stump, Respondent; and to that end tenders his petition and brief, together with a certified copy of the entire record of the said Circuit Court of Appeals.

SAMUEL O. TANNAHILL,

ROBERT D. LEEPER,

JAMES E. BABB,

Attorneys and of Counsel for
Petitioner.

JAMES E. BABB,

Of Counsel for Petitioner.

No.

IN THE SUPREME COURT OF THE UNITED STATES

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SAMUEL O. TANNAHILL,

ROBERT D. LEEPER

Empire National Bank Building,
Lewiston, Idaho, Attorneys for
Petitioner.

JAMES E. BABB,

Lewiston National Bank Building,
Lewiston, Idaho, of Counsel
for Petitioner.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Samuel D. White, Trustee in Bankruptcy of Pete Stump, Bankrupt, filed under the provisions of Section 25d of the Bankruptcy Act of 1898, respectfully presents to this honorable court for solution the following novel, grave and important question, involving a uniform construction of the Bankruptcy Act of the United States, that is to say:

CAN A BANKRUPT OR HIS WIFE CLAIM A STATUTORY HOMESTEAD EXEMPTION UNDER THE LAWS OF THE STATE OF IDAHO, WHEN NEITHER HAS EXECUTED OR RECORDED A WRITTEN AND ACKNOWLEDGED DECLARATION OF HOMESTEAD AS REQUIRED BY LAW UNTIL AFTER THE PETITION IN BANKRUPTCY HAS BEEN FILED?

And to that end shows as follows:

FIRST: That Pete Stump and Veta Stump were, at all times in this petition mentioned, and are now, husband and wife, and citizens and residents of the County of Nez Perce, and State of Idaho.

SECOND: That the said Pete Stump and Veta Stump were, prior to the second day of February, 1922, the owners of, and resided upon that certain real property situated in the County of Nez Perce, and State of Idaho, and more particularly described as follows, to-wit: The Northeast Quarter (NE 1-4) of Section Thirty-one (31), Township Thirty-eight (38), North, of Range One (1) W. B. M., containing one hundred sixty (160) acres. That title to the said property stands

upon the records in the name of Pete Stump, subject to a mortgage of \$5,500.00 in favor of the Vermont Loan & Trust Co.

THIRD: That on the 2nd day of February, 1922, the said Pete Stump filed in the District Court of the United States for the District of Idaho, Central Division, his petition in bankruptcy, which is set forth in full at pages 6 to 26 inclusive of the transcript. That in his said petition, the said Pete Stump did not claim the above described land as a homestead exemption. That as shown by the schedules of said petition, the principal creditor interested in this proceeding is the Farmers Bank, erroneously listed in the schedules as the Vollmer-Clearwater Company, to which bankrupt is indebted to the amount of about \$4,000.00. Thereafter, Veta Stump, the wife of Pete Stump, on the 1st day of March, 1922, made and acknowledged a declaration, selecting and claiming the above described realty as a homestead for the joint benefit of herself, her husband and their three minor children. This declaration was filed and recorded in the County Recorder's Office on March 29th, 1922. At the adjourned first meeting of creditors on April 8th, 1922, the said Veta Stump, through her attorney, submitted to the referee in bankruptcy, Honorable Charles H. Chance, of Lewiston, Idaho, her claim in writing, praying that the homestead be set apart to her out of the assets of the estate. The trustee, Samuel D. White, resisted the application, and the proper pleadings having been formulated, the issue was tried by the referee, who made an order disallowing the claim of homestead except subject to the claim of general creditors.

FOURTH: That thereupon, a review of the said order of the referee was taken to the Honorable F. S. Dietrich, Judge of the District Court of the District of Idaho, who reversed the decision of the referee and ordered that he take further proceedings not out of harmony with his decision therein rendered. Judge Dietrich's memorandum order is found at pages 51 to 55 of the Transcript.

FIFTH: That thereupon the trustee applied for a review of the decision of the District Court to the Circuit Court of Appeals of the Ninth Circuit, and upon such review, the said Circuit Court of Appeals sustained the decision of Judge Dietrich and ordered that the homestead be allowed as a paramount claim against the estate of Pete Stump. The decision of the said Circuit Court of Appeals is found at pages 65 to 73 of the Transcript.

SIXTH: The Statutes of Idaho in regard to a homestead exemption which are pertinent to this inquiry are as follows:

"The word homestead as used in this title includes within its meaning:

The dwelling house in which the claimant resides, and the land on which the same is situated and located as in this title provided; also the proceeds thereof in the event of a voluntary sale, and also the insurance thereon, if any, in the event of a loss."

Section 5437, Idaho Compiled Statutes, 1919.

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration.

2. On debts secured by mechanic, laborer or vendor's liens upon the premises.

3. On debts secured by mortgages upon the premises, executed and acknowledged by the husband and wife or by an unmarried claimant.

4. On debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record."

Section 5441, Idaho Compiled Statutes, 1919.

"In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a conveyance of real property is acknowledged, a declaration of homestead, and file the same for record."

Section 5462, Idaho Compiled Statutes, 1919.

"The declaration must be recorded in the office of the recorder of the county in which the land is situated."

Section 5464, Idaho Compiled Statutes, 1919.

"From and after the time the declaration is filed for record the premises therein described constitute a homestead"

Section 5465 Idaho Compiled Statutes 1919.

Provisions of the Bankruptcy Act which are pertinent are as follows:

"Sec. 6.—Exemptions of Bankrupt. a. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Sec. 7. The bankrupt shall . . . (8) prepare, make oath to and file in court . . . a claim for such exemptions as he may be entitled to."

Section 47a.

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable pro-

ceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Section 70a.

"The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

It has been decided by this honorable court in the case of *Aeme Harvester Company vs. Beekman Lumber Company*, 222 U. S. 300, 56 L. Ed. 213, as follows:

"The filing of the petition is a caveat to all the world, and, in effect, an attachment and an injunction . . . The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."

This honorable court has also decided in the case of *Bailey vs. The Baker Ice Machine Company*, 239 U. S. 268, 60 L. Ed. 275, as follows:

"When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceedings are initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court. We have said: 'The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and a distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded

as in custodia legis from the filing of the petition.' *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307, 56 L. Ed. 208, 213, 32 Sup. Ct. Rep. 96. And again: 'We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' "

The Supreme Court of the State of Idaho in the case of *Ryan vs. Rogers*, 14 Idaho 309 has held as follows:

"In such case, 'the filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by the law which is equal in rank to seizure on attachment or execution, and with respect to the right to attack transfers or encumbrances by the bankrupt as either actually or constructively fraudulent the trustee stands in the same position as an attachment or execution creditor.' "

And the said Supreme Court of the State of Idaho has reaffirmed that rule in the case of *Kettenbach vs. Walker* 32 Idaho 544.

It is the position of this applicant that, under the bankruptcy statute and the construction placed thereon by this honorable court, and by the Supreme Court of the State of Idaho, the line of cleavage for all matters affecting the bankrupt estate is the date of the filing of the petition, that the filing of such petition is in effect the same as an attachment under the State Law, and that the property is in custodia legis from the date of the filing of the petition; that the trustee acquires the status of a creditor having a judgment or attachment lien as of the time when the petition in bankruptcy is filed; and that if a declaration of homestead is not prop-

erly executed and recorded by either the bankrupt or his wife prior to the filing of his petition in bankruptcy, the title of the trustee vested as of the date of the filing of the petition. It is the further contention of this applicant that no subsequent act either of the bankrupt or his wife could divest the title of the trustee or the creditors whom he represents. In as much as this honorable court has decided that the filing of a petition is in effect an attachment, and the Supreme Court of the State of Idaho has held that the filing of such a petition gives a lien equal in rank to that of an attachment, the lien of this trustee is of necessity superior to that of the homestead claim.

The exemptions to which a bankrupt is entitled are fixed and defined by the laws of the state in which he has his domicile. At the time of the filing of this petition, the real property above described was not exempt, and is therefore liable to the claims of the creditors of the bankrupt by virtue of the lien required by the trustee, which dates as of the filing of the petition. A homestead right is a vested interest in land, not a mere exemption, which cannot be created subsequently to the attaching of the trustee's lien.

SEVENTH: That a decision by this honorable court is necessary in this action to promulgate a uniform construction of the bankruptcy act in this, to-wit:

That this identical question has been decided in different and contradictory manners in different circuits of the United States Circuit Court of Appeals, that is to say;

In the Circuit Court of the United States for the Eighth Circuit, it has been decided in the cases of *In re Nye*, 133 Fed-

eral 33; *In re Youngstrom*, 153 Fed. 98; and *Edgington vs. Taylor*, 270 Fed. 48; that, under facts identical with those in issue in this case, the lien of the trustee is superior to the lien of the homestead claimant.

"A homestead exemption under the bankruptcy act can be claimed only where given by the laws of the state, and in interpreting such laws the decisions of the highest courts of the state are controlling.

Under Rev. St. Colo. 1908, 2950, 2951, as construed by the Supreme Court of the state, to entitle the head of a family to a homestead exemption the word homestead must have been entered by either husband or wife on the margin of the record title to the property, and a bankrupt cannot claim property exempt as a homestead unless such entry was made prior to the filing of the petition in bankruptcy, as of which time title to the property vests in the trustee."

Edgington vs. Taylor—Supra.

The Circuit Court of Appeals for the Fifth Circuit, has decided as follows:

"No preparatory steps to occupy the purchased premises were taken by him before bankruptcy. The attitude of the case is therefore that of one claiming a homestead without occupancy or tangible possession to that end, and without having declared his intention to occupy the premises as a home. The authorities are against the sufficiency of such a showing for homestead exemption."

Peyton vs. Farmers National Bank of Hillsboro
(Tex.) 261 Federal 326.

The United States District Court for the District of Ohio, Eastern Division, speaking by Judge Westenhaver, has decided as follows:

"The Bankruptcy Act does not create any personal or homestead exemptions in favor of the bankrupt. It merely preserves to the bankrupt the full benefit of such exemptions as at the time of the adjudication he is entitled

to under the state law. Bankruptcy Act pars. 6, 7a, 8, 47a (11), 70a; Holden vs. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018. The determination, therefore, of this question depends on the state of the Ohio law respecting homestead exemptions."

In re Hewitt 244 Fed. 245.

In the Circuit Court of the United States for the Ninth Circuit, in the case of Brandt vs. Mayhew, 218 Federal 422, and in the instant case, the holding has been exactly to the contrary, the court holding that under Section 6 of the Bankruptcy Act the court had the right to allow a claim of homestead made subsequently to the filing of the petition in bankruptcy.

"This court has in Brandt vs. Mayhew, 218 Fed. 422, declared that the purpose of the amendment to section 47a, which is now comprised by clause 2 of such section, was to make effective the rights of creditors against those who claimed secret or unrecorded liens or adverse interests in the property of the bankrupt; and that it did not affect the provisions of section 6 of the act, which guarantees to the bankrupt the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in bankruptcy."

In re Stump (this case) Transcript, page 69.

That this conflict is causing grave trouble is apparent from the opinion of United States District Judge Bourquin in the case of In re Lehfeldt, (Montant), 225 Federal 681, where it is said:

"In principle the case is indistinguishable from In re Mayhew 218 Federal 422, 134 C. C. A. 210 to which, as the decision of a superior tribunal, it is the duty of this court to conform. But it is believed that the dissenting opinion in the Mayhew case, quoting from In re Youngstrom 153 Federal 98, 82 C. C. A. 232, is the better doctrine; and

diversity of opinion in respect to the question may justify brief reasons for this belief

There is nothing in the Bankruptcy Act providing for divestiture of the trustee's title by subsequently created exemptions or at all, save in the instances of composition and of dower and allowances fixed by state law for widows and children of decedents, in case of the bankrupt's death. If the exemption does not exist when the bankruptcy petition is filed, title to the property vests in the trustee for the benefit of creditors, and its status then controls its disposition throughout save as last aforesaid.

But to conform to the Mayhew case, as in duty bound the order of the referee is affirmed."

And so it is that your petitioner contends that by reason of the decision in the case at bar, and others herein cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the Act itself, required by Section 8, Subsection 4, Article 1, of the Constitution of the U. S. as to this grave and important question.

EIGHTH: That in the opinion of your petitioner the decision of the Circuit Court of Appeals of the Ninth Circuit upon this matter was and is manifestly erroneous, by reason of all of the matters hereinbefore set forth, and should be revised by this honorable court in matter of law.

Your petitioner hereto appends his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send

to this court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case there in entitled; "In the Matter of the Estate of Pete Stump, Bankrupt; Samuel D. White, as Trustee of the Estate of Pete Stump, Bankrupt, Petitioner vs. Veta Stump, Respondent, No. 3904" to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals may be modified so as to sustain the petition for review filed by said Samuel D. White, Trustee, in that Court in Bankruptcy.

And your petitioner will ever pray.

SAMUEL D. WHITE,

Trustee of the Estate of Pete
Stump, Bankrupt; Petitioner.

SAMUEL O. TANNAHILL,

ROBERT D. LEEPER,

JAMES E. BABB,

Attorneys for Petitioner.

JAMES E. BABB,

Of Counsel for Petitioner.

STATE OF IDAHO,)
) ss.
 County of Nez Perce)

Samuel D. White, being first duly sworn upon his oath, deposes and says: That he is the Trustee of the Estate of Pete Stump, bankrupt, and the petitioner named in the foregoing petition; that he has read all of the foregoing petition, and that the allegations there of are true to deponent's knowledge, information and belief; and as to all matters within his knowledge he believes it to be true and as to all matters upon information and belief and advice of counsel says that said petition states the true facts as he has been informed and advised and therefore believes.

SAMUEL D. WHITE,

Subscribed to before me this 23rd day of December, 1922.

SAMUEL O. TANNAHILL,

Notary Public in and for said
 State, residing at Lewiston,
 therein.

(Seal)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINTS AND AUTHORITIES

I

At the date of the filing of the petition this property was non exempt, and was subject to transfer, levy and execution.

Idaho Compiled Statutes of 1919—Secs. 5441 quoted in full p. 8, 5462, quoted in full p. 8, 5463, quoted in full p. 8, 5464, quoted in full p. 8, 5465, quoted in full p. 8.

See Cases cited under Point 2 below.

Argument pp. 22 to 23:

II

A legally acquired lien or a legal investiture of title cannot be defeated by any subsequent act of the debtor or his wife.

Smith vs. Richards, 2 Idaho 498, 21 Pac. 419, cited p. 23-24-25, 44.

Wright vs. Westheimer, 3 Idaho 232, 28 Pac. 430, cited p. 25.

Burbank vs. Kirby, 6 Idaho 210, On rehearing 213, 55 Pac. 285, cited p 25-26.

Law vs. Spence, 5 Ida. 244, 48 Pac. 282, cited p. 26-27.

Goodwin vs. Colorado Mortgage & Investment Company, 110 U. S. 1, 28 L. Ed. 47, cited p. 27.

Argument pp 23 to 27.

III.

The filing of a petition in bankruptcy is in effect an at-

tachment, and a caveat, dating from the date of filing the petition.

Acme Harvester Company vs Beekman Lumber Co.,
222 U. S. 300, 56 L. Ed. 213, cited p. 27-28.

Bailey vs. Baker Ice Machine Company, 239 U. S.
268; 60 L. Ed. 275, cited p. 28.

Ryan vs. Rogers, 14 Idaho 309, 94 Pac. 427, cited p. 29.

Kettenbach vs. Walker, 32 Idaho 544, 186 Pac. 912,
cited p. 30.

In re Lehfeldt, 225 Fed. 681, cited p. 31.

Argument pp. 27 to 31.

IV.

The homestead right constitutes an estate in land obtained by the making and filing of a proper declaration. It is beyond a mere statutory exemption, and its allowance creates a new estate.

Barber vs. Babel, 36 California 11, cited p. 32-33.

Lubbock vs. McMann, 82 California 226, 22 Pac. 1145,
cited p. 31.

Hirsch vs. Prescott, 89 Fed. 82, cited p. 33.

Whitworth vs. McKee, 32 Washington 83, 72 Pac.
1046, cited p. 31.

Fritts vs. Fritts, 298 Ill. 314; 131 N. E. 584, cited p. 33.

Gillespie vs. Fulton Oil and Gas Co., 236 Illinois 188,
86 N. E. 219, cited p. 34.

Argument pp. 31 to 34.

V.

After the rights of the trustee had attached they could not be thereafter divested by the bankrupt court.

Comment on opinion of C. C. A. In re Stump (this case), Transcript 68-69, cited p. 34-35.

Section 6 of Bankruptcy Act, cited p. 35.

Sections 47a and 70a of the Bankruptcy Act, p. 35.

Acme Harvester Co. vs. Beekman Lumber Company,
222 U. S. 300, 56 L. Ed. 213, cited p. 36.

Bailey vs. Baker Ice Machine Company, 239 U. S.
268, 60 L. Ed. 275, cited p. 36.

In re Nye, 133 Fed. 33, cited p. 36.

In re Youngstrom, 153 Fed. 103, cited p. 37-38.

Edgington vs. Taylor, 270 Fed. 48, cited p. 38-39.

Goodwin vs. Colorado Mortgage Investment Com-
pany, 110 U. S. 1, 28 L. Ed. 47, cited p. 37.

Peyton vs. Farmers National Bank of Hillsboro, 261
Fed. 326, cited p. 39.

In re Hewitt, 244 Fed. 245, cited p. 39.

In re Lehfeldt, 225 Fed. 681, cited p. 39.

Argument pp. 34 to 39.

VI.

By the filing of the petition, creditors are deprived of their remedy under state laws, and the bankrupt and his wife are estopped to assert an after acquired or created title.

Acme Harvester Company vs. Beekman Lumber Co.
222 U. S. 300; 56 L. Ed. 213, cited p. 39.

Bailey vs. Baker Ice Machine Company, 239 U. S.
268; 60 L. Ed. 275, cited p. 39.

In re Boyd, 120 Fed. 999, cited p. 40-41.

In re Phillips, 209 Fed. 490, cited p. 41.

Argument pp. 39 to 41.

VII

The construction placed by the C. C. A., 9th Circuit upon the relationship of Section 6 of the Act to Section 47a and 70a is erroneous, and imparts ambiguity to a perfectly clear statute. The line of cleavage for all purposes is the date of filing the petition.

Sections 6, 47a and 70a of Bankruptcy Act, cited p. 42.

Acme Harvester Company vs. Beekman Lumber Co.
222 U. S. 300; 56 L. Ed. 213, cited p. 43.

Bailey vs. Baker Ice Machine Company, 239 U. S.
268; 60 L. Ed. 275, cited p. 43.

Everett vs. Judson, 228 U. S. 473-57 L. Ed. 927,
cited p. 43.

Argument pp. 41 to 44.

ASSIGNMENT OF ERROR.

Your petition assigns as error the entering of judgment by the Circuit Court of Appeals of the Ninth Circuit in the instant case, wherein the decision of the District Court of the United States for the District of Idaho was sustained, such judgment being found at pages 73-74 of the Transcript.

ARGUMENT.

The question to be decided in this case is clear cut, and it involves the determination of the relationship of Sections 47a and 70a of the Bankruptcy Act to Sections 6 and 7 (8) thereof. (Quoted in petition p. 7.) As set forth in Section 6 of the petition one line of decisions, particularly in the Eighth Circuit, holds that under 47a the trustee takes the estate as of the date of filing the petition, and if no proper declaration of homestead was on record at that time, the homestead cannot be afterwards claimed. The ninth Circuit has held in the instant case that 47a is subservient to Section 6 of the Act, and that a bankrupt or his wife can claim a homestead after filing the petition by complying with state laws. We believe that the rule as promulgated in the Eighth Circuit is supported by the better reasoning, and in support thereof urge the following:

POINT I.

At the date of the filing of the petition, this property was not exempt.

The decision of this case hinges entirely upon the construction to be placed upon Sections 5441, 5462, 5463, 5464 and 5465 of the Compiled Statutes of Idaho, taken in connection with the provisions of the Bankruptcy Act.

5462 provides that in order to claim a homestead, the husband or wife

“must execute and acknowledge, in the same manner as a conveyance of real property, a declaration of homestead, and file the same for record.”

5464 provides that

"The declaration must be recorded in the office of the recorder of the county in which the land is situated."

5441 provides that

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained before the declaration of homestead was filed for record, and which constitute liens upon the premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration."

And 5465 provides,

"From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Therefore it cannot be disputed that at the date of the filing of Stump's petition in bankruptcy, this property was not exempt and was subject to levy and execution. Neither the bankrupt nor his wife had a homestead right therein, actual, constructive or otherwise, until a proper declaration was executed and recorded. This was not done prior to the filing of the petition.

POINT 2.

A legally acquired lien cannot be divested by any subsequent act of bankrupt or his wife.

The right to attach real property in this state upon which no declaration of homestead has been filed is an integral part of all contracts, and is a rule of property of this state. It has been decided by the Supreme Court of Idaho, in construing 5441, that no subsequent act of the debtor or his wife could divest a legally acquired lien.

"The question presented for our consideration is, can the defendant, or his wife, under the circumstances, by filing a declaration of homestead subsequent to the attaching of a judgment lien, divest that lien, and prevent

the property being made subject to it. It is with some difficulty that we have been able to arrive at a satisfactory conclusion in this case. Such doubts have arisen mainly from a consideration of the decisions of the courts of Nevada and California. These cases appear to hold that the homestead itself is exempt from forced sale under execution, and that a subsequent filing of a declaration of homestead under the statute defeats the operation and effect of the lien. Although we are of the opinion that these cases do not go fully to that extent, yet, even if they do, we are not prepared to uphold the doctrine laid down therein. Freeman in his work on Executions, Sections 249, 249d, 249e, says, referring to the cases which we have mentioned: 'These provisions clearly make it the duty of the officer to levy the writ on all property not then exempt from execution, and afterward, in the event of plaintiff's recovering judgment, to sell all the property attached, if necessary to produce a satisfaction of such judgment. We think, therefore, that, construing all the statutes together, it clearly appears that these decisions are wrong, and that, when an attachment is properly levied on lands not then exempt from attachment and execution, a lien is created which no subsequently arising exemption can supplant; and in so thinking we are sustained by a decided preponderance of the adjudications upon this subject.' Thompson on Homesteads and Exemptions, Section 317, says: 'If a simple contract debt, created at a time when the creditor has not had the notice required by law—whether given by visible occupancy or a declaration of record—that the debtor has withdrawn a certain portion of his land from exemption by making it his homestead, will bind such homestead, a fortiori a valid lien placed upon land before it acquires the character of homestead will not be subsequently impaired by the debtor occupying such land as his homestead, or, in those states where such a proceeding is required, by filing the statutory declaration of homestead. If the legislature of a state cannot divest such a lien, it is pretty clear that a private individual can

do no act which would have this effect. Plain as this conclusion would seem to be, the question has been thrust in the face of the courts again and again.' Smyth on Homestead and Exemption, section 35, says, 'that, if the premises became a homestead after a lien has attached, this does not discharge or affect the lien;' and a 'lien claimant, having a lien older than the homestead right, may enforce his lien without any reference 'to such homestead right.' Platt on Property Rights of Married Women, Section 7 says: 'All liens acquired before the homestead has been established must be raised, or it will be subject to forced sale for their satisfaction.' And again, in the same section, he says: 'Consequently an appropriation of land as a homestead subsequent to the levy of an attachment or the attaching of a judgment lien cannot protect it from forced sale under the lien thus acquired.' "

Smith vs. Richards, 2 Idaho, 498,-21 Pac. 419.

Community property is subject to attachment and execution for the debts either of the community or of the husband separately.

Holt vs. Empey 32 Idaho 106-178 Pac. 703.

"The required homestead declaration must be filed in order to secure the benefit of the exemption laws."

Wright vs. Westheimer 3 Idaho 232-28 Pac. 430.

"It is the act of the owner of the property, whereby such owner secures a right or privilege given him by the statute, and which is a derogation of the common law and common right, and which can only be secured by a substantial compliance with the provisions of the statute, conditions precedent to the investiture of the property with the exceptional character contemplated. If the title to the property passes from the owner by due and proper proceedings in the course of law, he cannot, after such title has vested in another, defeat it by establishing a homestead nunc pro tunc."

OPINION ON RE HEARING

"The proceeding to exempt the homestead is a statutory one. To exempt the home from the lien of attachment, judgment, or execution, a declaration, containing the matters required by law, acknowledged as required by law, and the acknowledgement certified as required by law, must be filed in the county recorder's office in the county where the homestead is situated."

Burbank v. Kirby, 6 Idaho 210, 213, 215. 55 Pac. 295.

"There is one fact in this case which seems to have been overlooked by counsel for the respondents as well as by the trial court, and that is that at the time of the execution and delivery of the mortgage upon real estate in this case such real estate was not a homestead. The statutes of Idaho provide the only means by which real estate can be impressed with the character of a homestead. (Idaho Rev. Stats., secs. 3070-3088). No attempt to comply with these provisions by the defendants, or either of them, was made until after this action was commenced. Section 3039 of the Revised Statutes of Idaho, among other claims or debts for which the homestead is liable, says (subdivision 4): 'On debts secured by mortgages upon the premises executed and recorded before the declaration of homestead was filed for record.' It follows that until after the action was commenced in this case the real estate in question was like any other community property, and subject to the same conditions. Section 2505 of the Revised Statutes, provides: 'The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate; but such power of disposition does not extend to the homestead or that part of the common property occupied or used by the husband and wife as a residence.'" Section 2494 of the Revised Statutes, is as follows: 'The husband is the head of the family. He may choose any reasonable place or mode of living; and the wife must conform thereto.' It follows that the property in question at the time the mortgage thereon was executed was

common property of the marital community."

Law vs. Spence, 5 Idaho 244-251. 48 Pac. 282.

This honorable court has so decided:

"A person is not entitled to the benefits of the homestead law in Colorado, unless the word 'homestead' be entered on the margin of the record title of the premises occupied by him as a homestead; actual notice to the creditors of the occupancy of particular premises as a homestead is not equivalent to such entry on the record.

Goodwin vs. Colorado Mortgage and Investment Co.
110 U. S. 1 - 28 L. Ed. 47.

POINT 3.

The filing of a petition in Bankruptcy is in effect an attachment and a caveat, dating from the date of filing the petition.

There can be no dissent from this proposition as it has been decided both by the Supreme Court of the United States and by the Supreme Court of Idaho.

"Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in *Mueller v. Nugent*, 184 U. S. 1-14; 46 L. Ed. 405, 411, 22 Sup. Ct. Rep. 269, where it is said: 'It is as true of the present law (1898, 30 Stat. at L. 544, Chap. 541, U. S. Comp. Stat. 1901, p. 3418) as it was of that of 1867 (14 Stat. at L. 517, Chap. 176), that the filing of the petition is a caveat to all the world, and, in effect, an attachment and injunction. *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866.

The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.

Pending the proceedings the law holds the property to abide the decision of the court upon the question of

adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purpose of the law by bringing separate attachment suits, which would virtually amount to preferences in favor of such creditors. See in this connection the well-considered case of *State Bank v. Cox*, 74 C. C. A. 285, 143 Fed. 91."

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 56 L. Ed. 213.

"But it is contended that sec. 47a, clause 2, of the Bankruptcy Act, as amended in 1910, Chap. 412, 36 Stat. at L. 838, 840, Comp. Stat. 1913, 9586, 9631, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, 'as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings.' Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court. We have said: 'The filing of the petition of an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.' *Acme Harvester Co. v. Beekman Lumber Co.* 222 U. S. 300, 307, 56 L. Ed. 208, 213, 32 Sup. Ct. Rep. 96. And again: 'We think that the purpose of the law was to fix the line of cleavage with

reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' *Everett v. Judson* 228 U. S. 474, 479, 57 L. Ed. 927, 929, 46 L. R. A. (N. S.) 154, 33 Sup. Ct. Rep. 568. And see *Zavelo v. Reeves*, 227 U. S. 625, 631, 57 L. Ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in 47a as amended. As this was not done, we think the better view and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed. Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the state."

Bailey vs. Baker Ice Machine Co., 239 U. S. 268, 60 L. Ed. 275.

"In such case, 'the filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by the law which is equal in rank to seizure on attachment or execution, and with respect to the right to attack transfers or encumbrances by the bankrupt as either actually or constructively fraudulent the trustee stands in the same position as an attachment or execution creditor.' (In re *Rogers* 125 Fed. 169, 60 C. C. A. 567; *Bankruptcy Act* Sec. 67)."

Ryan v. Rogers, 14 Idaho, p. 309-94 Pac. 427.

"Nor do the provisions of Sec. 47a, as amended of the national bankruptcy act, giving general creditors the status of creditors holding liens by legal or equitable process, militate against the rule, for the reason that, as stated by the Supreme Court of the United States, such status of the general creditors does not arise until the

to petition in bankruptcy is filed. (Bailey v. Baker Ice Machine Co., supra; Anderson v. Chenault, supra; 2 Remington on Bankruptcy, 2d Ed., p. 1124, Sec. 1270, to 3-10).¹² is hereby furnished and below last of notes

Kettenbach v. Walker, 32 Idaho, 544, p. 550-186 Pac. 912.

This being the rule, it seems to us fundamental that the lien of the trustee attached to this land under the statute in exactly the same manner as if a creditor had attached in the state court. Both the Idaho Supreme Court and the United States Supreme Court hold that the filing of the petition is in effect a caveat or an attachment, and the consequence must abide the words. The effect of a legal lien imposed upon the land by attachment or otherwise prior to declaration of homestead, is, in Idaho, to defeat the homestead right. Therefore, this being the effect, the filing of the petition in voluntary bankruptcy prior to a declaration of homestead must, in so far as creditors are concerned, defeat a later claim for homestead. This particularly in view of Sec. 47a and 70a of the Bankruptcy Act.

Clearly this real estate could have been levied upon and sold under judicial process at any time prior to the filing of the petition regardless of the rights of the wife therein. Just the minute that an attachment or other judicial levy was made upon these premises, under the statutes of the State of Idaho, the premises became absolutely subject to judicial sale under any judgment recovered therein. The filing of the petition was in effect an attachment and after the petition was filed no creditor could attach, as is set forth in the Beekman case, supra. By the filing of the petition the trustee acquired all of the rights of an attachment or execution creditor against

this property. Neither the bankrupt nor his wife by any act of theirs could divest the lien thereof. In re Lehfeldt, 225 Fed. 691. The Supreme Court of Idaho in the case of Smith vs. Richards, 2 Idaho 498, has held that the rights of spouses are subject to this judicial process and that they cannot afterwards claim any homestead right after the lien of such process has attached. This petitioner has no greater rights to the homestead than is given her by the statutes and decisions of Idaho and this court should follow those decisions. The lien of the creditors in this estate has attached and cannot be divested.

POINT 4

The homestead right constitutes an estate in land obtained by the making and filing of a proper declaration. It is beyond a mere statutory exemption, and its allowance creates a new estate.

"When the attributes of residence and selection according to law exist so as to express its essence, the homestead becomes an estate in the premises selected, exempted by law from forced sale."

Lubbock vs. McMann, 82 Cal. 226, 22 Pac. 1145-1147.

"But perhaps the better reason is that a homestead in this state is in the nature of a vested interest, or a species of estate which, when once acquired, is not destroyed by the mere repeal of the statute authorizing its acquisition, but can be relinquished only by the voluntary act of the person holding it. On whichever of these grounds, however, the rule may be said to rest, the rule itself has been so firmly embodied in our decisions as not to be now overthrown."

Whitworth vs. McKee, 32 Wash. 83, 72 Pac. 1046-1051.

"In the homestead estate most of the unities of the joint tenancy are found, for it is created by the same instrument and at the same time. The homestead right and the joint interests are created by the executing, acknowledging, and recording of the declaration. The new character of the state, with its new incidents, commences at that moment, and the new rights vest in both parties at the same time. So far as the homestead right is concerned they have one and the same interest accruing by one and the same conveyance, (or act), commencing at one and the same time, and held by one and the same undivided possession."

It is manifest from this, and the other provisions of the Act, that the Legislature intended that the husband and wife, to the extent of the homestead value, should hold a joint estate, or interest, in the land of some kind, which could not be reached by creditors, or in any way alienated, incumbered, or impaired by the act of either, without the consent of the other. The mode of accomplishing the object adopted is by filing a declaration of intention either by the husband and wife jointly, or by either alone, stating the prescribed facts in as solemn and formal manner as is adopted in the conveyance of real estate. It is made a public record and notice to all, like conveyances of real estate, so that none can be misled as to the character of the estate vested and held by the occupants or owners of homesteads by virtue of filing the declaration in pursuance of the statute. Whatever doubt there may be as to the power of the wife alone to devote the separate property of the husband, or the husband the separate property of the wife, to such an object, and by their own separate act vest the joint homestead interest without the assent of the other, we see no objection to either devoting his, or her, own separate property, or the common property to such object by an act thus formal.

Although the mode of creating the joint estate, or interest in the husband and wife, is not a conveyance in form from the one in whom the title stands upon the record, to the two, and although the former legal title

may be conceded to remain where it was before, yet the effect and operation of the act of recording the declaration made in due form, is to take from the separate property of the party owning and consenting—if the consent of the owner is required—or the common property of both, the property claimed as a homestead, and to vest in the two jointly an estate, or interest in the land, which interest, to the extent of the homestead value, cannot thereafter, while both live, be severed, alienated, incumbered, divested, destroyed, or impaired without the concurrent act of both parties, equally solemn and formal with that by which the new and different estate or interest was created."

Barber vs. Babel, 36 California 11, pages 16-18.

"A homestead is more than a mere right of occupancy exempt from levy and sale for debts."

Fritts v. Fritts, 298 Illinois 314, 131 N. E. 584.

"I think it would be quite unseemly in a federal court to do so. The legislature of Virginia, in giving to the head of a family power to waive the homestead, and in wholly omitting to provide that, or how, it shall, if personalty or money, be tied up in his hands, for the benefit of succeeding beneficiaries of the exemption, and finally of creditors, has seemed to have intentionally constituted it a fee in his hands, and to have left it subject to his will."

Hirsch vs. Prescott, 89 Fed. 52.

See also the following:

Jones v. De Graffenreid, 60 Ala. 145,

Johnson v. Turner, 29 Ark. 280,

Abbott v. Abbott, 97 Mass. 136,

Woodbury v. Luddy, 14 Allen 1, 92 Am. D. 731,

Kerley v. Kerley, 13 Allen 286,

Silloway v. Brown, 12 Allen 30,

Cross v. Weare, 62 N. H. 125,

Ketcham v. Ketcham, 269 Ill. 584, 109 NE 1025,

Snell v. Snell, 123 Ill. 403, 14 NE 684, 5 AmSR 526,

Fizette v. Fizette, 37 Ill. A. 536,

Board of Trustees v. Beale, 6 Ill. A. 536,

Swan v. Stevens, 88, Mass. 7,

Parks v. Reilly, 5 Allen (Mass.) 77.

Gillespie vs. Fulton Oil & Gas Co., 236 Illinois 188-86
N. E. 219.

Therefore, Section 6 of the Bankruptcy Act furnishes no proper basis upon which to defeat the manifest intention of Congress as expressed in 47a and 70a. **After the estate of homestead has been properly created, then that estate can be declared exempt under Section 6 if it existed at the time of filing the petition. But Section 6 cannot furnish the foundation for the creation of the estate, after a legal lien has attached and after title has passed to the trustee by operation of law. The question of a strict or liberal construction of the exemption statute is not in issue. The rule is fundamental.**

POINT 5

After the rights of the trustee had attached they could not be thereafter divested by the Bankrupt Court.

The Circuit Court of the Ninth Circuit, in its decision of the instant case, based its decision upon the premises that Section 6 and 7a of the Bankruptcy Act were paramount, in the following words:

"First, let it be premised that exemptions to which the bankrupt is entitled are fixed and defined by the laws of the state in which he has his domicile, but the time and manner of claiming, selecting and allowance of exemptions are matters wholly within the jurisdiction and control of the bankruptcy courts. Further, under section 7a, clause 8, the voluntary bankrupt is required to prepare and file with his petition for bankruptcy a schedule of his assets and liabilities which shall contain 'a claim for such exemptions as he may be entitled to.' These

claims may be amended if seasonably done. In *re Webb*, 219 Fed. 349, 350. Or if by oversight the claim for home-
stead is omitted from the schedule, it may be amended if
timely application therefor is made to the court. In *re*
Maxson, 170 Fed. 356.'

Now, as to the contention of counsel: This court has
in *Brandt v. Mayhew*, 218 Fed. 422, declared that the pur-
pose of the amendment to section 47a, which is now com-
prised by clause 2 of such section, was to make effective
the rights of creditors against those who claimed secret
or unrecorded liens or adverse interests in the property of
the bankrupt; and that it did not affect the provisions
of section 6 of the act, which guarantees to the bankrupt
the exemptions which are prescribed by the state laws
in force at the time of the filing of the petition in bank-
ruptcy."

In *re Stump* (this case) page 69 of Transcript.

Yet the court admits the following:

"It is no longer to be disputed that 'the exclusive
jurisdiction of the bankruptcy court is so far in rem that
the estate is regarded as in *custodia legis* from the filing
of the petition.' *Acme Harvester Co. v. Beekman Lum-
ber Co.*, 222 U. S. 300, 307. Or that under Section 47a,
clause 2 the trustee acquires the status of a creditor
having a lien as of the time when the petition in bank-
ruptcy is filed. *Bailey v. Baker Ice Machine Co.*, 239 U.
S. 268, 275, 276."

Page 68 of Transcript.

Section six of the Act, upon which the above decision is
based, reads as follows:

"Section 6. Exemptions of Bankrupt. a. This act
shall not affect the allowance to bankrupts of the exempt-
ions which are prescribed by the state laws in force at the
time of the filing of the petition in the state wherein they
have their domicile for the six months or the greater
portion thereof immediately preceding the filing of the
petition."

The homestead exemption in Idaho, as prescribed by the state law in force at the time of the filing of the petition, is allowed "from and after the time the declaration is filed for record."

No such declaration was on file at the time of the filing of the petition, and the property was not exempt. It therefore passed to the trustee under Section 47a and 70a of the Act, as decided in *Acme Harvester Company vs. Beekman Lumber Company* and *Bailey vs. Baker Ice Machine Company—Supra*.

After the lien of the trustee had vested, the property no longer belonged to the bankrupt. Under the state law no exemption existed at the time of such vestiture. The trustee could not have reported it as exempt under 7a, cited by the Circuit Court in this case.

Contrary rulings in other Federal Circuits, which we believe are supported by the better reasoning, held as follows:

"The provisions authorizing bankrupt courts to determine all claims of bankrupts to their exemptions, and directing trustees to set apart the bankrupts exemptions (Sections 2, 47, 30 Stat. 545, 557 U. S. Comp. St. 1901 pp. 3420, 3438), disclose no purpose to render the exemptions less beneficial than intended by state laws, but are in harmony with the purpose of the act, disclosed in other provisions, to make those laws the measure of the extent and nature of the exemptions, as well as of the right to them."

In re Nye, 133 Fed. 33.

"We conclude that a claimed exemption otherwise recognized by the state laws, but to which the bankrupt had not become entitled at the time of the filing of the petition or at the time he was adjudged a bankrupt, is not within the saving and protecting clauses of the Bankruptcy Act, and cannot be allowed or set apart thereunder.

Was the bankrupt or his family entitled to the homestead exemption here asserted at either of these times? The answer must be found in the state statutes before set forth and the decisions of the Supreme Court of the state interpreting them. Repeated decisions of that court are to the effect that the purpose of these statutes is to preserve the home for the family, and to that end, to protect it from alienation by one spouse without the concurrence of the other, and also from execution or attachment arising from any debt, contract, or civil obligation; that no one is entitled to the protection and benefits of these statutes until the premises are designated as a homestead upon the margin of the record title as prescribed in Section 2132, *supra*; and that this designation is effective only from time it is made, and has no retrospective operation. *Drake v. Root*, 2 Colo. 685; *Wells v. Caywood*, 3 Colo. 487; *Barnett v. Knight*, 7 Colo. 365, 3 Pac. 747; *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Goodwin v. Colorado Mortgage Investment Co.*, 110 U. S. 1, 5, 3 Sup. Ct. 473, 28 L. Ed. 47.

In the last case it was said by Mr. Justice Harlan: 'No one is entitled to the benefits of the foregoing statutory provisions unless the word 'homestead' be entered upon the margin of the recorded title of the premises occupied as a homestead. Such are the express words of the statute, and there is no room left for construction. We are not at liberty to say that the Legislature intended actual notice to creditors of the occupancy of particular premises as a homestead to be equivalent to the entry on the record of title the word 'homestead.' The requirement that the record of the title shall show that the premises are occupied as a homestead before any person can become entitled to the benefits of the statute is absolute and unconditional.'

The premises in controversy were not so designated until after the time of the filing of the petition and after the time when the owner was adjudged a bankrupt, so neither he nor his family was entitled to a homestead exemption therein at either of these times.

But under the Bankruptcy Act, when a debtor is adjudged a bankrupt, his entire estate, in so far as it is not exempt, is in legal contemplation as effectively brought into custodia legis and appropriated to the payment of his debts as if it were taken in execution or attachment, subject only to the qualification that, where the act does not specially provide otherwise, as it does in respect of cases affected by fraud, the estate is brought into custodia legis and appropriated in the same plight and condition in which the bankrupt himself held it, and subject to all the equities imposed upon it in his hands."

In re Youngstrom, 153 Fed. 103.

The court will note that this case is used as the basis of a strong dissenting opinion by Circuit Judge Erskine M. Ross in the Brandt vs. Mayhew case 218 Fed. 422, which is the precedent used in the decision of this case.

"A homestead exemption under the Bankruptcy Act can be claimed only where given by the laws of the state, and in interpreting such laws the decisions of the highest courts of the state are controlling.

Under Rev. St. Colo. 1908, 2950, 2951, as construed by the Supreme Court of the State, to entitle the head of a family to a homestead exemption the word homestead must have been entered by either husband or wife on the margin of the record title to the property, and a bankrupt cannot claim property exempt as a homestead unless such entry was made prior to the filing of the petition in bankruptcy, as of which time title to the property vests in the trustee."

"When the property in question was claimed as a homestead in the voluntary petition in bankruptcy, it was claimed under the provisions of section 2950, Rev. Sts. Colo. 1908. Counsel therefore must have known what the statute required when he drew the petition. Title to the land in question vested in the trustee as of the date of the filing of the voluntary petition in bankruptcy, Sections 47a and 70a, Bankruptcy Law."

Edgington vs. Taylor 270 Fed. 48, Dec. 20, 1920.

The Circuit Court of Appeals for the Fifth Circuit, has decided as follows:

"No preparatory steps to occupy the purchased premises were taken by him before bankruptcy. The attitude of the case is therefore that of one claiming a homestead without occupancy or tangible possession to that end, and without having declared his intention to occupy the premises as a home. The authorities are against the sufficiency of such a showing for homestead exemption."

Peyton vs. Farmers National Bank of Hillsboro
(Tex.) 261 Federal 326.

The United States District Court for the District of Ohio, Eastern Division, speaking by Judge Westenhaver, has decided as follows:

"The Bankruptcy Act does not create any personal or homestead exemptions in favor of the bankrupt. It merely preserves to the bankrupt the full benefit of such exemptions as at the time of the adjudication he is entitled to under the state law. Bankruptcy Act pars. 6, 7a, 8, 47a (11), 70a; **Holden vs. Stratton**, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018. The determination, therefore, of this question depends on the state of the Ohio Law respecting homestead exemptions."

In re Hewitt 244 Fed. 245.

POINT 6.

By the filing of the petition, the creditors are deprived of their remedy under state laws, and bankrupt and wife are estopped to assert an after acquired or created title.

Under **Acme Harvester Company v. Beekman Lumber Company**, *Supra.*, the supreme court conclusively decided that after the filing of a petition in bankruptcy the creditors could not attach. Therefore, by filing this petition the bankrupt defeated a right of the creditor given him by state law.

Upon this right to attach hinged the right to subject this land to execution sale. At the time of filing this petition the land was not exempt, and was subject to attachment. The bankrupt made no claim for exemption in his schedules, and never has made any such claim. There was no process whereby creditors could subject this land to the payment of their claims except through the Bankruptcy Court. If the decision of the lower court is sustained, we permit the bankrupt, by his voluntary act, to deprive his creditors of the right to attach, and then, long after their rights accrued in the Bankruptcy Court, we permit him to claim a homestead right. The creditors were, during the interim, helpless. We believe that the bankrupt and wife will, under such circumstances, be estopped to assert their homestead.

"1. Bankruptcy—Exempt Property—State Statutes.

Bankr. Act, 6, July 1, 1898, 30 Stat. 548, U. S. Comp. St. 1901, p. 3424, declaring that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the law of the state where the bankrupt has his domicile, did not enlarge the exemptions available to the bankrupt under the state laws, nor prevent the enforcement of Code Iowa, 4015, providing that none of the exemptions prescribed in the chapter should be allowed against an execution issued for the purchase money of property claimed to be exempt.

2. Same—Estoppel of Bankrupt.

Code Iowa, 4015, provides that none of the exemptions prescribed by the chapter should be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. Held that, where a bankrupt invoked the benefit of the bankrupt act, and thereby precluded a seller of exempt property from obtaining a judgment and levying execution thereon, as required by such section, he was estopped to object that the court of bankruptcy had no

jurisdiction to order that such property be sold, and the proceeds applied to the unpaid purchase price, on the ground that no judgment had been recovered or execution levied.

3. Same—Sale of Exempt Property—Application—By Whom Made.

Since no title to exempt property passes to the trustee in bankruptcy, creditors having claims for unpaid portions of the purchase price of such property, claiming the right to have it sold, and the proceeds applied to such claim, are the proper persons to present such question, and not the trustee in bankruptcy."

In re Boyd 120 Fed. 999.

The case of In re Phillips 209 Fed. 490, is of similar import, where the court holds:

"The trustee under Section 47 and kindred provisions of the Bankruptcy Act is vested with all the rights, powers and remedies of a creditor holding a lien by legal or equitable process on property in his custody. I think this holding on behalf of creditors by the trustee operated with the same effect under the Washington statute, *supra*, as a levy made under execution. From this conclusion it must follow that the bankrupt is not entitled to any of the property claimed which has not been set aside and apart to him as exempt as against unpaid wages or for materials which have not been paid for."

POINT 7.

The construction placed upon 47a of the Bankruptcy Act, as amended in 1910, in the instant case and in *Brandt vs. Mayhew* 218 Fed. 422, is strained and contrary to its plain and unambiguous wording. The line of cleavage for all purposes is the date of the filing of the petition.

In the *Brandt vs. Mayhew* case, the court said:

"Section 6 of the act remains unamended and unrepealed. The amendment does not affect the provisions

of that section The purpose of the amendment to 47a was to make effective the rights of creditors against those who claimed secret or unrecorded liens or adverse interests in the property of the bankrupt."

The language of the statute is perfectly plain and unambiguous. It provides that:

"Such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." 47a.

There is no restriction in this language such as the lower court has attempted to insert in it. It is sweeping and all inclusive. The trustee takes the estate as he receives it. The bankrupt has no further title to non-exempt property after the filing of the petition, and this property was then non-exempt.

The provisions of 70a of the act are also explicit, and provide:

"The trustee shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The honorable court of the Ninth Circuit has attempted to place in these statutes an unwarranted restriction.

This court enunciated the doctrine that "the filing of the

petition is in effect a caveat and an attachment. *Acme Harvester Co. vs. Beekman Lumber Co.*, *Supra*. The latter case was approved in *Everett vs. Judson*, 228 U. S. 473, 57 L. Ed. 927, (1913) wherein this court said:

"While it is true that p. 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in *Acme Harvester Co. v. Beekman Lumber Co.* 222 U. S. 300, 56 L. Ed. 208, 32 Sup. Ct. Rep. 96, wherein it was held that, pending the bankrupt proceedings, and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

"We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. And it is as of that date that the surrender value of the insurance policies mentioned in p. 70a should be ascertained."

These cases were later approved in *Bailey vs. Baker Ice Machine Company* (*supra*) heretofore quoted.

There is not the slightest suggestion either in the law, or in the decisions of this tribunal, that the line of cleavage is not for all purposes. Property exempt at the time of filing

the petition remains exempt and must be set over to the bankrupt. Property which is non-exempt at that date remains non-exempt and title to it vests in the trustee.

The law of Idaho, as enunciated in *Smith vs. Richards*, 2 Idaho, 500 and other cases cited, is contrary to the rule laid down by the Circuit Court. *Coughanour vs. Hoffmans Estate* 2 Idaho 290, is not in point, in as much as the statute then in force (Revised Laws of Idaho 1874-5 page 627) permitted the claiming of a homestead at any time prior to execution sale, the statute reading as follows:

"Such exemption shall not extend to any mechanic's, laborer's or vendor's liens lawfully obtained, nor to any mortgage or other lien, lawfully taken or required, to secure the purchase money, for said homestead."

Furthermore, this decision merely decided that a surviving wife as the head of a family under the statute was entitled to claim the homestead.

TO SUMMARIZE:

- (1) The premises constitute a homestead only "from and after" the filing for record of a proper declaration. A homestead constitutes a vested estate in land created by the execution and filing of the declaration and it is beyond the power of a Federal Court to invest the bankrupt or his wife with this estate after the filing of the petition.
- (2) A legally acquired lien upon real property cannot be divested by subsequent declaration of a homestead.
- (3) The filing of a voluntary petition in bankruptcy is in effect a caveat and an attachment, and thereafter the property is in custodia legis.
- (4) The trustee under 47a is deemed vested with all of the

rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, and the line of cleavage is the date of the filing of the petition. The trustee acquires title to the property as of the date of the filing of the petition, under 70a, because the property at that date was subject to transfer, levy and execution.

(5) The property was not exempt at the time of the filing of the petition, and passed absolutely to the trustee. Neither the bankrupt nor his wife can subsequently claim a statutory homestead, but are estopped.

(6) The line of cleavage for **all purposes** in bankruptcy is the date of the filing of the petition.

(7) In the opinion of your petitioner the Circuit Court of Appeals of the Ninth Circuit manifestly erred in its decision of this matter.

Wherefore, may it please your Honors to grant the writ for the reasons herein set forth, to the end that the whole case on the record may be examined, and right completely done.

Respectfully submitted,

SAMUEL O. TANNAHILL,

ROBERT D. LEEPER,

JAMES E. BABB,

Attorneys and of Counsel for
Petitioner.

JAMES E. BABB,

Of Counsel for Petitioner.

No.

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of PETE STUMP, Bankrupt,
 SAMUEL D. WHITE, Trustee,

Petitioner,

vs

VETA STUMP,

Respondent,

**REQUEST TO CLERK TO CALL UP AND
 SUBMIT PETITION.**

TO WILLIAM R. STANSBURY, CLERK OF THE SUPREME COURT OF THE UNITED STATES:

Counsel for Samuel D. White, trustee, petitioner for a writ of certiorari in the above entitled matter, hereby under "paragraph three of the instructions as to applications for writs of certiorari under Acts of March 3, 1891, and September 6, 1916," respectfully request that you call up and submit in open court, for petitioner, his said petition, as per a notice served on opposing counsel and proof of such service herewith filed.

SAMUEL O. TANNAHILL,

ROBERT D. LEEPER,

JAMES E. BABB,

Attorneys and of Counsel for
 Petitioner.

JAMES E. BABB,

Of Counsel for Petitioner.

No.....

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of PETE STUMP, Bankrupt,
 SAMUEL D. WHITE, Trustee,
 Petitioner,

vs

VETA STUMP,

Respondent,

NOTICE OF REQUEST TO SUBMIT

TO HARVE PHIPPS, Spokane, Washington, attorney for respondent:

You will please take notice that petitioner will file with his said petition and brief, the foregoing request to the Clerk of the Supreme Court of the United States, to call up and submit in open court the said petition at the January term, 1923 of said court, at the opening of the said court on the 22nd day of January, 1923, in the court room of the said court at the Capitol, in the City of Washington, D. C. or as soon thereafter as counsel, or the said clerk for counsel, can or may be heard for the purpose aforesaid.

SAMUEL O. TANNAHILL,
 ROBERT D. LEEPER,
 JAMES E. BABB,

Attorneys and of Counsel for
 Petitioner.

JAMES E. BABB,

Of Counsel for Petitioner.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of PETE STUMP, Bankrupt,
 SAMUEL D. WHITE, Trustee,
 Petitioner,

vs.

VETA STUMP,

Respondent.

PROOF OF SERVICE.

UNITED STATES OF AMERICA,)
 State and District of Idaho,) ss.
 County of Nez Perce,)

Robert D. Leeper, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the petitioner above named in the above entitled cause; that he deposited in the postoffice of the United States, at Lewiston, Idaho, with postage prepaid, by registered mail, on this ~~24th~~ day of December, 1922, a full, true and correct copy of the record in the court below, together with a full, true and correct copy of the petition for writ of certiorari herein and brief in support thereof, notice of application for writ, motion for writ, request to clerk for a submission and notice thereof, addressed to and served thus upon Harve H. Phipps, attorney for respondent, at his office in the Sherwood Building, Spokane, Washington; that return cards were demanded for the receipt of the said registered mail; that the original registry receipts aforesaid are attached hereto, and that by reason of such evidence, it is shown that the said Harve H. Phipps, was served thus on the ~~24th~~ day of December, 1922.

ROBERT D. LEEPER.

Subscribed and sworn to before me this ~~24th~~ day of December, 1922.

SAMUEL O. TANNAHILL,
 Notary Public in and for said state,
 residing at Lewiston, therein.

(Seal).

